

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs April 9, 2007

IN RE J.H.S.

**Appeal from the Juvenile Court for Greene County
No. J18872 Kenneth Bailey, Jr., Judge**

No. E2006-02433-COA-R3-PT - FILED MAY 8, 2007

The Juvenile Court terminated the parental rights of P.S. ("Mother") to her six year old son, J.H.S. The trial court found, by clear and convincing evidence, that grounds for terminating Mother's parental rights existed and that termination of her parental rights was in the best interest of the child. Mother appeals challenging the termination of her parental rights. We modify the judgment and affirm as so modified.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court
Modified and Affirmed as so Modified; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Gerald T. Eidson, Greeneville, Tennessee, for the Appellant, P.S.

Robert E. Cooper, Jr., Attorney General and Reporter, and Lauren S. Lamberth, Assistant Attorney General, Nashville, Tennessee, for the Appellee, State of Tennessee, Department of Children's Services.

OPINION

Background

In 2004, J.H.S (the “child”) came into DCS custody following a tragic event. Mother, the child, and one of the child’s older brothers, I.S., were in Oklahoma visiting Mother’s biological mother. Unbeknownst to Mother, her biological mother kept a loaded gun in a kitchen drawer. One day while Mother was sleeping, the two children found the loaded gun and I.S. accidentally shot and killed himself. Upon Mother’s return to Tennessee, DCS filed an emergency petition for temporary custody, which was granted.

The record in this case begins with a petition to terminate Mother’s parental rights filed in March of 2006. In the petition, DCS alleged that the child had been in DCS custody since May 10, 2004, after it obtained the emergency protective custody order referenced above. As grounds for terminating Mother’s parental rights, DCS alleged that, pursuant to Tenn. Code Ann. § 36-1-113(g)(2), Mother had failed to substantially comply with the terms and statement of responsibilities contained in a permanency plan. DCS further alleged that Mother’s parental rights should be terminated pursuant to Tenn. Code Ann. § 36-1-113(g)(3) in that the child had been removed from Mother’s care for over one year, DCS made reasonable attempts to assist Mother, but the conditions which led to the child’s removal or other conditions existed which prevented the safe return of the child to Mother’s care. DCS claimed there was little likelihood that these conditions would be remedied in the near future and that continuation of the parent/child relationship would greatly diminish the child’s chances for early integration into a safe and stable home. Finally, DCS alleged that it was in the child’s best interest for Mother’s parental rights to be terminated.¹

The first witness at trial was Teresa Fletcher (“Fletcher”), a licensed family therapist. Fletcher became involved in this case after being asked to provide therapy for the child “to explore and address behavior problems and any previous trauma.” According to Fletcher, the change in foster care placement, then being home with Mother, and then back in foster care has caused problems for the child consistent with separation anxiety. Fletcher stated that the child needs consistency and permanency and it would hurt the child’s lack of consistency to be with Mother if Mother then left the child with a babysitter for several days at a time.

The next witness was Genetta Gross (“Gross”), a child youth therapist with Frontier Mental Health. Gross has worked with the child since October of 2005. Gross testified that after the child was removed from Mother’s care following a trial home placement, the child eventually adjusted well to the new foster parents. Gross stated that permanency was very important to the child.

¹DCS also sought to terminate the parental rights of the child’s alleged father, W.K.S., or any other unknown person who may be the child’s biological father. The Juvenile Court terminated the parental rights of W.K.S. or any other unknown person who may be the child’s biological father, and that portion of the judgment is not at issue in this appeal.

Donna James (“James”) is a teaching assistant employed by the Head Start program at Tusculum View School. According to James, on December 7, 2005, Mother brought the child to school late and the child looked very tired. Mother “slammed the sign-in book down on the counter ... [and] asked me who the person was that had called DCS” After slamming the book down Mother said “somebody has really fu**ed up” and left. Mother was muttering to herself as she left and had her arms up in the air. The child heard Mother’s comments and Mother said nothing to the child as she left. James described another incident where Mother told her “I just can’t wait until all this is over with in January and I can do what I want.” James also explained that on another occasion she went to Mother’s apartment to have a parent-teacher conference and knocked on Mother’s door, but Mother never answered even though her car was in the parking lot. Mother later told James she was a very sound sleeper and that is why she did not answer the door. On yet another occasion Mother was not at the bus stop to pick up the child and James took the child to Mother’s apartment. Mother eventually came to the door, and she had just woken up. According to James, the school principal wanted to have a parent-teacher conference with Mother, but Mother either did not make the appointment or did not show up. Mother brought the child to school late several times, on other occasions the child was wearing clothes that did not fit, and at times the child was hungry and had not eaten anything before coming to school. James added that the child seemed to be doing better since he started living with the current foster parents.

Tammy Idell (“Idell”) was the child’s foster parent before the child was returned to Mother’s care for the trial home placement. During the trial home placement, Idell agreed to assist Mother with childcare when Mother was working. According to Idell, Mother would drop the child off on Thursday and Idell would keep the child in her care until Monday morning, at which time Idell would take the child to school. However, Mother would call Idell and check on the child or come by and visit with him. When Mother would drop off the child, he was clean and had been fed. Idell never took the child to school with clothes that were too big or with him looking unkempt.

Jeannie Morgan (“Morgan”) is a case manager with DCS. Morgan testified that a trial home placement began on August 10, 2005, when the child was returned to Mother’s care on a trial basis. DCS provided various in-home services to Mother. Prior to the trial home placement, Mother had supervised visits with the child for ten months. During the trial home placement, there were problems with the child missing the school bus. Morgan emphasized to Mother the importance of getting her child to the bus on time so that he could get to school on time and be provided a breakfast. On one occasion Morgan picked him up from school and he was wearing pants that were so big the child had to hold them to keep them from falling off.

Morgan explained an incident that occurred in December of 2005. Apparently, Mother had asked a friend of hers to pick up the child. The friend then sent someone else to pick up the child and the school properly refused to release the child to this unknown man. Morgan picked up the child from school that day because no one could get in touch with Mother. Morgan then scheduled a meeting with Mother to discuss that event and various other problems, but Mother did not show up. The meeting was rescheduled and, once again, Mother did not show up, but every one else was there including Mother’s attorney and the guardian ad litem. Mother’s attorney

inquired as to whether the child was at school that day, so Morgan called the school and learned that the child was not there. Morgan tried to contact Mother to no avail. Because she could not get in touch with Mother and because the child was not in school, Morgan contacted DCS's legal department to have the trial home placement ended and the child returned to foster care. According to Morgan:

[Mother's parenting skills] had gotten worse prior to filing the petition [to terminate her parental rights]. She was not staying at her home. Her and [the child] were staying with people throughout the week. She was leaving [the child] with different people while she worked night shifts, which I understand she had to have a babysitter, but I tried to get her to pick one person and stick with that one person. She was unable to be reached by phone. The school couldn't contact her. Sometimes I couldn't contact her. [The child] would go to school unkempt, hungry, tired.

Morgan added there were times when Mother was not at the bus stop to pick up the child. According to Morgan, there were several times she went to visit Mother and Mother "wasn't sure where [the child] was."

Morgan, however, admitted on cross-examination that Mother substantially complied with the requirements of her most recent permanency plan, except for her inability to consistently demonstrate proper parenting skills. Morgan added that Mother did well when services were provided, but when the services ended Mother stopped doing well with her parenting skills.

P.S. is Mother's father and the child's maternal grandfather. P.S. lives in North Carolina and has custody of Mother's oldest son, C.S. During the trial home placement, P.S. visited Mother on several occasions and brought C.S. to visit with Mother and the child. P.S. stated that he saw nothing during these visits that would concern him about Mother's parenting abilities. P.S. talks to Mother on the telephone several times a week and offers Mother financial assistance if necessary. P.S. has not formally adopted C.S. According to P.S., C.S. is in school and participates in sports and P.S. believes it is in C.S.'s best interests for him to remain in P.S.'s custody at this time. However, P.S. stated that he would feel comfortable if Mother were to regain custody of C.S.

Laurie Gregg ("Gregg") is the assistant manager at the apartment complex where Mother has lived for over two years. Gregg stated that Mother never is behind or late with the rent. Gregg would often see Mother and the child together and Gregg never saw anything that gave her concern over whether Mother was properly parenting the child. According to Gregg, the interaction between Mother and the child was "very loving"

Mother testified that she is currently employed for PAI and she works with the mentally handicapped. At the time of trial, Mother had been working for PAI for approximately one month and works 25 to 30 hours a weeks earning \$7.50 an hour. Mother works second shift from

3:30 pm to 9:00 pm. Mother previously worked third shift at Greene County Skills. Mother worked at Greene County Skills for eight months and left that job because third shift was “too difficult” for her. Mother later acknowledged that she was fired from Greene County Skills because of excessive absenteeism.

Mother currently sees a mental health therapist once a month. Mother has been diagnosed with bipolar disorder but currently takes no medication because she is not yet covered under her new employer’s health care plan. Mother has prepared a budget that goes a couple of months into the future. Mother is current on all of her bills.

When the child was temporarily returned to Mother’s care for the trial home placement, Mother was working third shift. Mother had problems with various babysitters and DCS told her to try and stick with one particular babysitter. Mother acknowledged leaving the child with a babysitter for several days at a time, but she would try to visit with the child when she could and always called him.

Mother stated she completed the requirements of the permanency plan and will do anything asked of her to prevent her parental rights from being terminated. Mother acknowledged missing two meetings with DCS. Mother overslept and missed one of the meetings, and claims she was not informed about the other meeting.

On cross-examination, Mother admitted that she does not have much money left over after paying her bills and she has “not yet” figured out how she would take care of the child from a financial standpoint if she were to regain custody.

Following the trial, the Juvenile Court issued a thorough memorandum opinion stating, in relevant part, as follows:

Pursuant to the Permanency Plan, [Mother] was to have a mental health intake and follow all recommendations. [Mother] testified that she saw a therapist once a month and she had been diagnosed as bi-polar. However [Mother] did not present a full mental health assessment to the Court. Furthermore, [Mother] admitted she had been diagnosed as bi-polar but that she was not taking her medication because she could not afford the medication.

The Permanency Plan required that [Mother] “consistently demonstrate appropriate parenting skills.” [Mother] failed to present evidence that she demonstrated appropriate parenting skills when the child was in her home on a trial home placement. The testimony in court was that during the trial home placement [Mother] frequently left [the child] with other individuals overnight, sometimes for three and four days at a time. The Court appreciates the fact that [Mother]

was working, however, she failed to show that the night shift was the only shift that she could work. Furthermore, the testimony in court was that the former foster parents (who were frequent babysitters for her) lived roughly thirty minutes from her. [Mother] admitted that there were several weekends that she would drop [the child] off on Thursday and pick him up on Sunday and she would not go visit him but she would call. This was during the period of the trial home placement.

Additionally, the Court finds that [Mother] failed to comply with the provision that she maintain a stable job and sufficient income to support [the child]. [Mother's] testimony was that all of her money goes to pay her bills such as rent, light bill, car insurance and gas. She testified at the trial that there was no money left over once her bills were paid. At the time of the trial she had been working for her employer for about three weeks because she had been fired from her previous employer When questioned as to why she was fired, [Mother] testified "they wanted to call it excessive absenteeism, but I have an issue with that, too." She did admit, however, "there was several times that I was late." Based upon the foregoing the Court finds that although [Mother] had complied with some provisions of the permanency plan by attending parenting classes, submitting to random drug screens and passing them, etc.; she substantially failed to comply with the most important provisions [of] providing adequate income for the family and exhibiting appropriate parenting skills for the child while he was on a trial home placement.

The [Court] further finds pursuant to TCA sec 36-1-113(g)(3) that the conditions which caused the child to come in to the care and custody of [DCS] continue to exist and are persistent conditions. The child has been removed from the home of [Mother] for a period exceeding six months and the conditions which lead to the removal still persist and prevent the child's return to the parent; there is little likelihood the conditions will be remedied at an early date to allow reunification in the future; and the continuation of the parent/child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home.

The child initially came into the care and custody of [DCS] because of the mother's lack of appropriate parenting skills while she was in Oklahoma. A trial home placement [began] on August 10, 2005 and on November 9, 2005 the trial home placement was

extended because of concerns regarding the lack of time the mother was spending with the child. The child had been in foster care since May of 2004. On the first day of trial in May of 2006, the child had been in foster care essentially for two years – with the exception of the few months that he was on a trial home placement with his mother. During those two years numerous services were offered to [Mother] for her to improve her parenting ability. Unfortunately, [Mother] continued to exhibit poor parenting skills and inappropriate behavior once the child was placed with her on a trial home placement.

Ms. James ... [testified that Mother] had made a statement that “I just can’t wait until all of this (involvement with DCS) is over with in January and I can do what I want.”

The Juvenile Court then went on to note that Ms. James had gone to Mother’s house on two occasions and Mother did not answer the door even though her car was in the parking lot. Mother claimed this was because she was a “sound sleeper.” The Juvenile Court also expressed “great concern” over Mother not being at the bus stop to pick up the child after school and Mother not participating in a parent/teacher conference even though such a conference was requested by the school principal. The Juvenile Court also took note of testimony that the child was sent to school wearing clothes that did not fit and without having eaten anything before going to school. Specifically, the Juvenile Court stated:

Ms. James testified that the school personnel were concerned over the fact the child would come to school hungry and that he would sometimes tell them that he had not slept in his own bed the night before and that he had spent the night somewhere else.

After reviewing the testimony above, the Juvenile Court found sufficient evidence that “persistent conditions continue to exist which cause the child to continue to be dependent and neglected and which give rise to the mother’s rights to the child being terminated.” Finally, the Juvenile Court determined that it was in the child’s best interests for Mother’s parental rights to be terminated.

The Juvenile Court then entered a final judgment terminating Mother’s parental rights. In the final judgment, the Juvenile Court summarized the main factual determinations set forth in the memorandum opinion and then found that there was clear and convincing evidence that grounds existed to terminate Mother’s parental rights pursuant to Tenn. Code Ann. §§ 36-1-113(g)(2) and (g)(3), and that there was clear and convincing evidence that termination of Mother’s parental rights was in the child’s best interest.

Mother appeals claiming the judgment of the Juvenile Court must be reversed because the Juvenile Court did not specifically state in its memorandum opinion that its conclusions were being made under the clear and convincing evidentiary standard. Mother then claims the Juvenile Court erred when it concluded that grounds had been proven to terminate her parental rights pursuant to Tenn. Code Ann. §§ 36-1-113(g)(2) and (g)(3).

Discussion

Our Supreme Court recently reiterated the standard of review for cases involving termination of parental rights. According to the Supreme Court:

This Court must review findings of fact made by the trial court *de novo* upon the record “accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.” Tenn. R. App. P. 13(d). To terminate parental rights, a trial court must determine by clear and convincing evidence not only the existence of at least one of the statutory grounds for termination but also that termination is in the child’s best interest. *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002) (citing Tenn. Code Ann. § 36-1-113(c)). Upon reviewing a termination of parental rights, this Court’s duty, then, is to determine whether the trial court’s findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.

In re F.R.R., III, 193 S.W.3d 528, 530 (Tenn. 2006).

In *Dep’t of Children’s Servs. v. D.G.S.L.*, this Court discussed the relevant burden of proof in cases involving termination of parental rights. Specifically, we observed:

It is well established that “parents have a fundamental right to the care, custody, and control of their children.” *In re Drinnon*, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972)). “However, this right is not absolute and parental rights may be terminated if there is clear and convincing evidence justifying such termination under the applicable statute.” *Id.* (citing *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)).

Termination of parental or guardianship rights must be based upon a finding by the court that: (1) the grounds for termination of parental or guardianship rights have been established by clear and convincing evidence; and (2) termination of the parent’s or guardian’s

rights is in the best interests of the child. Tenn. Code Ann. § 36-1-113(c). Before a parent's rights can be terminated, it must be shown that the parent is unfit or substantial harm to the child will result if parental rights are not terminated. *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999); *In re M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Similarly, before the court may inquire as to whether termination of parental rights is in the best interests of the child, the court must first determine that the grounds for termination have been established by clear and convincing evidence. Tenn. Code Ann. § 36-1-113(c)....

Dep't of Children's Servs. v. D.G.S.L., No. E2001-00742-COA-R3-JV, 2001 WL 1660838, at *6 (Tenn. Ct. App. Dec. 28, 2001), *no appl. perm. appeal filed*.

The Juvenile Court terminated Mother's parental rights pursuant Tenn. Code Ann. §§ 36-1-113(g)(2) and (g)(3) (Supp. 2006), which provide:

(g) Initiation of termination of parental or guardianship rights may be based upon any of the following grounds:

* * *

(2) There has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care pursuant to the provisions of title 37, chapter 2, part 4;

(3) The child has been removed from the home of the parent or guardian by order of a court for a period of six (6) months and:

(A) The conditions that led to the child's removal or other conditions that in all reasonable probability would cause the child to be subjected to further abuse or neglect and that, therefore, prevent the child's safe return to the care of the parent(s) or guardian(s), still persist;

(B) There is little likelihood that these conditions will be remedied at an early date so that the child can be safely returned to the parent(s) or guardian(s) in the near future; and

(C) The continuation of the parent or guardian and child relationship greatly diminishes the child's chances of early integration into a safe, stable and permanent home

Mother's first issue is her claim that the Juvenile Court's judgment must be reversed because the Juvenile Court did not specifically state in its memorandum opinion that its findings were made under the legally mandated clear and convincing evidentiary standard. Mother is correct that the Juvenile Court did not specifically state in its memorandum opinion that its findings were made under a clear and convincing standard. However, in the final judgment, which reiterated the pertinent factual findings set forth in the memorandum opinion, the Juvenile Court stated on numerous occasions that its findings were made under the clear and convincing standard. Mother's first issue is, therefore, without merit.

Mother's second issue is her challenge to the finding of the Juvenile Court with respect to Tenn. Code Ann. § 36-1-113(g)(2), *i.e.*, that she failed to substantially comply with the terms of a permanency plan. What constitutes substantial compliance certainly can vary from case to case, depending on what is required in a particular permanency plan. As stated previously, Morgan, the DCS case manager, specifically testified that Mother had substantially complied with the requirements of her most recent permanency plan. According to Morgan, the only permanency plan requirement where Mother fell short was her inability to consistently demonstrate proper parenting skills. In its brief on appeal, DCS concedes that Mother did substantially comply with the terms of her permanency plan. In light of DCS's concession and the testimony of Morgan, we conclude that the evidence preponderates against the Juvenile Court's determination that there was clear and convincing evidence to terminate Mother's parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(2). The judgment of this Juvenile Court on this particular issue is, therefore, reversed.

The next issue is whether the Juvenile Court properly terminated Mother's parental rights pursuant to Tenn. Code Ann. § 36-1-113(g)(3). There is no doubt that the time the child has been removed from Mother's care exceeds six months. The Juvenile Court made many factual findings which it believed were persistent conditions which prevented the child's safe return to Mother in a timely manner. Among other things, the Juvenile Court found that: (1) during the trial home placement, Mother would leave the child with a babysitter for four days at a time; (2) Mother failed to maintain stable employment; (3) Mother often was late when taking the child to school; (4) Mother would take the child to school hungry and because she was late getting the child to school, he missed the breakfast provided at school; (5) several times Mother was not at the bus stop to pick up the child; (6) Mother did not participate in a parent/teacher conference that was requested; and (7) Mother was not taking necessary medication for her bipolar disorder. In addition, Mother testified that all of her income goes to paying bills and she has yet to figure out how she would financially care for the child if he was returned to her care. We also note that there were times, according to Morgan, when Mother did not know where the child was. In light of the foregoing, we cannot conclude that the facts preponderate against the Trial Court's conclusion that there was clear and convincing evidence that conditions existed which would prevent the child's safe return to Mother, that there was little likelihood these conditions would be remedied in the future, and that continuation of the parent/child relationship would diminish the child's chances for early integration into a safe, stable and permanent home.

The final determination made by the Juvenile Court was that there was clear and convincing evidence that it was in the child's best interest for Mother's parental rights to be terminated. While Mother does not raise as an issue on appeal whether the Trial Court erred in finding that there was clear and convincing evidence that it was in the child's best interest for her parental rights to be terminated, we will, nevertheless, address that issue. The factors a trial court must consider when deciding whether the termination of parental rights is in the best interest of a child are set forth in Tenn. Code Ann. § 36-1-113(i) (Supp. 2006). In relevant part, these factors are:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

* * *

- (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
- (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
- (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

The above list is not exhaustive and there is no requirement that all of the factors must be present before a trial court can determine that termination of parental rights is in a child's best interest. *See Dep't. of Children's Servs. v. P.M.T.*, No. E2006-00057-COA-R3-PT, 2006 WL 2644373, at *9 (Tenn. Ct. App. Sept. 15, 2006), *no appl. perm. appeal filed*.

The facts set forth at length above demonstrate that Mother is not able to properly care for the child. Notwithstanding the efforts made by DCS, Mother cannot be said to have made an adjustment of her circumstances that would allow the child to be returned safely to her care. The testimony at trial was such that the child needs consistency. The only way that can happen in a reasonably prompt fashion is for Mother's parental rights to be terminated. The evidence is such that if the child was returned to Mother, it is likely that he again would end up in DCS custody at some point in the near future. After reviewing the applicable factors in light of the facts discussed above, we conclude that the evidence does not preponderate against the Juvenile Court's findings and conclusion that there was clear and convincing evidence that termination of Mother's parental rights was in the child's best interest.

Conclusion

The judgment of the Juvenile Court is modified and affirmed as so modified, and this cause is remanded to the Juvenile Court for collection of the costs below. Costs on appeal are taxed to the Appellant, P.S., and her surety, if any.

D. MICHAEL SWINEY, JUDGE